Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-874

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

TIMOTHY C. SHASHATY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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Printed by
Brescia's Printing Services, Inc.
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QUESTION PRESENTED

WHETHER THE ADMISSION OF EVIDENCE OF THE PETITIONER'S PRE-ARREST, POST-MIRANDA SILENCE, RELATING TO HIS FAILURE TO CORRECT A FALSE ALIBI HE HAD GIVEN TO POLICE IN A WRITTEN STATEMENT, AMOUNTED TO A VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976), WHEN THE WRITTEN STATEMENT HAD BEEN PRECEDED BY THE PETITIONER'S PRE-ARREST, PRE-MIRANDA ORAL STATEMENT TO THE SAME EFFECT?

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CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

OPINION BELOW

The opinion of the Connecticut Supreme Court, upon certification of the case from the Connecticut Appellate Court, is reported at 205 Conn. 39, ___A.2d ___ (1987), and is reproduced in the petitioner's appendix. The opinion of the Connecticut Appellate Court is reported at 8 Conn. App. 387, 513 A.2d 172 (1986) and also is reproduced in the petitioner's appendix.

STATEMENT OF THE CASE

A. Facts Underlying the Petitioner's State Convictions

On March 6, 1983, the victim, an eighteen-year-old senior in high school, attended a party at the home of her friend, Emily Lewis, in Milford, Connecticut. The party was in honor of Jack Athens, Lewis's boyfriend. Approximately twenty-five guests attended the party, including the petitioner, and a keg of beer was provided for refreshment.

The victim and the petitioner became acquainted at the party and, at about 9:00 p.m., drove to a nearby convenience store to purchase some cigarettes for several of the guests. The two engaged in small-talk during the half-mile drive and returned to the party no more than five minutes later.

Later in the evening, at about 11:00 p.m., a confrontation arose between the victim and another guest, Sherri Athens, regarding the disappearance of the victim's purse. The confrontation escalated into a physical struggle between the two women and the victim ultimately retreated to an upstairs bathroom. Shortly thereafter, the petitioner entered the bathroom and spoke to the victim.

By the time the victim had left the bathroom the party was over and only she, Emily Lewis, Jack Athens and the petitioner remained in the house. Lewis and Athens eventually went upstairs, leaving the victim and the petitioner downstairs. The petitioner talked to the victim for some time about the incident with Sherri Athens and, at some

point, tried to kiss the victim. She resisted and told the petitioner that she had to go home. With that, the victim left the house between 12:30 a.m. and 1:00 a.m. and proceeded to walk home.

Unaware that the petitioner was following her, the victim walked down Carrington Avenue, despite the heavy rain and fog of that night. The petitioner caught up with the victim at Gulf Street and demanded that she walk with him. Ignoring her expressed desire to walk alone, the petitioner picked the victim up, threw her over his shoulder and started walking down the street. Despite the victim's screams and protests, the petitioner walked in this manner for about one block and informed the victim that she would be released on

one condition: "If I put you down, you have to let me hold your hand and walk with you." The victim acceded to the petitioner's demand and walked hand-in-hand with him for another block.

The two eventually reached a point where the victim, in order to reach her home, had to turn left. The petitioner, intent on turning to the right, once again picked up the victim and, ignoring her screams, carried her through a wooded area behind a residential development and then dropped her to the ground.

Next, the petitioner pinned the victim to the muddy ground by placing his knees on her arms. She screamed, whereupon the petitioner put his hands over her mouth. She attempted to bite the petitioner, and did so "just

barely", whereupon the petitioner threatened to hit her. Having subdued the victim, the petitioner unzipped her jacket and then pulled off one leg of her pants and her panties. In a futile effort to prevent the rape, the victim told the defendant that she had venereal disease. The defendant responded that "he didn't care".

With that, the petitioner forcibly and fully penetrated the victim's vagina with his penis. After about two minutes of forcible intercourse, the petitioner fled. The victim dressed herself and walked home.

The next morning, the victim reported the sexual assault to a family member. The next day, March 8, 1983, the victim gave a statement to the Milford Police Department and was

examined by a physician. The examination revealed no evidence of vaginal trauma and vaginal smears tested negative for pregnancy, spermatozoa and venereal disease.

Subsequent examination of the victim's clothes, however, revealed evidence of sexual intercourse. "Crusty stains" on the crotch area of the victim's slacks and panties tested positive for acid phosphatase, a substance found in high concentration in semen. Fragments of soil and vegetation were detected on the slacks and panties; a soil stain was visible on the back pocket area and along one side of the slacks. Vegetation and mineral particles were detected on the victim's sweater.

Chemical analysis of the saliva and

blood of the victim and the petitioner revealed that both had "O" blood types, but that the petitioner carried an "H" antigenic substance in his body fluids, thus indicating that he was a so-called "O" "secretor". Analysis of the victim's blood revealed no evidence of antigenic substances, indicating that she was a "non-secretor". Testing of the "crusty stains" on the victim's slacks and panties revealed they were deposited by an "O" "secretor", consistent with the characteristics of the petitioner's blood.1

Upon these facts, as were reasonably found by the jury in the Connecticut

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1 Approximately 80% of the population are "secretors". However, had the petitioner been a "non-secretor" or had a different blood type, he could have been excluded as the source of the "crusty stains."

Superior Court, the petitioner was convicted on February 17, 1984, of sexual assault in the first degree; Conn. Gen. Stat. §53a-70 (1983 Rev.); and unlawful restraint in the first degree. Conn. Gen. Stat. §53a-95 (1983 Rev.). He was sentenced by the court on March 30, 1985 to a total effective sentence of six years of imprisonment.

B. Facts Relating To The Petitioner's Failure To Correct A False Alibi He Had Given To Police Officers

Milford police officers first contacted the petitioner regarding the victim's sexual assault complaint on March 10, 1983, four days after the assault. The petitioner voluntarily agreed to meet the officers at the police station later that afternoon, arrived at the police station as agreed, and was interviewed by police for

approximately ninety minutes.[2] See Respondent's Appendix, at A-1--A-7.

The petitioner was asked to account for his time on the night of the assault, which he did in some detail. This oral statement, in which the petitioner denied the accusation and proferred an alibi, was then reduced to a written statement which the petitioner signed. After his oral statement, but prior to the written statement, the petitioner was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), read a "rights waiver" form supplied by police, initialed each right on the form and then signed it. The

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[2] It is undisputed that the petitioner's statements to police, both oral and written, were freely and voluntarily given in noncustodial circumstances. See State v. Shashaty, 205 Conn. 39, 47, ___A.2d___ (1987); Petition, at 4, 17.

petitioner's written statement was contained in a printed, standardized police form and included the following recitation:

> I, Timothy C. Shashaty (6-6-62), age 20, of 345 Pond Point Avenue, City of Milford, State of Connecticut, make the following statement without promise, knowing it may be used in court. I have been advised that I have a right to consult with a lawyer, to stand mute, and to sign nothing. These Rights I hereby waive. I make this statement to Sergeant W. Graham, whom I know to be a member of the Milford Police Department.

The text of the written statement, which merely recounted the petitioner's prior oral statement, recited that the petitioner had left the Lewis house at 1:00 a.m., with his girlfriend Melissa Jungett, William McCafferty and Maryann Kopec in Kopec's car and was driven directly to his home, where he im-

mediately went to bed. At trial, the petitioner admitted that he had lied in the written statement as to his whereabouts, but asserted a new alibi that he had hitchhiked home from the party and had been picked up by a person he knew as "Mark", who drove him home.

In the absence of the jury, the state proffered rebuttal evidence that the petitioner had not - after the interview of March 10, 1983 and before his formal arrest on March 23, 1983- informed the police that he had lied in his statements to police nor did he inform police of the completely different alibi he later asserted at trial. Over the petitioner's objection and exception, the trial court permitted the state to so inquire. Officer Graham testified, in relevant part, as follows:

[Mr. Kelly:] And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?

[A:] No.

[Mr. Kelly]: At any time during that period or time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from Emily Lewis's party on March 6?

[A:] No.

C. State Appellate Proceedings

The petitioner timely appealed his conviction to the Connecticut Appellate Court, raising two issues: (1) That the trial court erred in giving the jury and unwarranted "missing witness" instruction as to "Mark", the person who had

picked up the petitioner while he hitchhiked home from the Lewis party; and (2) that the trial court erred in permitting the state to introduce evidence of the petitioner's silence prior to his arrest, but after receiving Miranda warnings. The Appellate Court affirmed the convictions, holding that, as to the first evidentiary issue, the petitioner had not proven the harmfulness of the trial court's erroneous instruction and, as to the second issue, holding that the state's comment on the petitioner's post-Miranda warnings silence was harmless beyond a reasonable doubt. See State v, Shashaty, 8 Conn. App. 387, 394, 513 A.2d 172 (1986); Petitioner's Appendix, at 16c-18c.

The Connecticut Supreme Court granted certification and affirmed the

Connecticut Appellate Court's decision. The state supreme court agreed that the petitioner had not demonstrated the harmfulness of the trial court's "missing witness" instruction and that, under any standard of review, the state's comment on the petitioner's silence did not warrant reversal of his convictions. See State v. Shashaty, 205 Conn. at 50-51; Petitioner's Appendix, at 1b-29b.

The court declined to rule that, because the case involved pre-arrest, post-Miranda warnings silence, there was no error under Doyle v. Ohio, 426 U.S. 610 (1976), and its progeny, as opposed to the finding of harmless error made by the Connecticut Appellate Court. See State v. Shashaty, 205 Conn. at 50; Petitioner's Appendix, at 26b. Noting

the two state court decisions which had addressed the question with different results; see State v. Robinson, 496 A.2d 1067 (Me. 1985); State v. Fencl, 109 Wis.2d 224, 325 N.W.2d 703 (1982); the court held: "Even if the admission of the rebuttal testimony concerning the [petitioner's] failure to return to the police in order to correct the statement he previously had given constituted a constitutional error, as the Appellate Court concluded, we agree with the further analysis made by that court holding that its admission was harmless beyond a reasonable doubt". 205 Conn. at 51; Petitioner's Appendix, at 29b.

REASONS FOR DENIAL OF THE PETITION

I. The Petition Presents An Isolated, Academic Claim Unworthy Of Review By This Court

This is not a case involving prosecutorial use of a criminal defendant's post-arrest, post-Miranda warnings silence. Doyle v. Ohio, 426 U.S. 610 (1976) (Doyle); Miranda v. Arizona, 384 U.S. 436 (1966) (Miranda). Rather, this is a case involving the unusual issue of the state's use of a criminal defendant's pre-arrest, post-Miranda warnings silence under circumstances in which evidence of the defendant's silence was independently admissible on other grounds. As such, the petition presents an isolated permutation of Doyle not having far-reaching precedential effect upon American jurisprudence generally. The

question simply fails to extend "beyond the academic or the episodic". Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

First, the Doyle issue presented by the petition hinges upon a comparatively unique circumstance: the police officers in this case, out of an overabundance of caution, gratuitously informed the defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), notwithstanding the undisputed fact that he was not in police custody at the time his written statement was executed.

Assessing these circumstances, the Connecticut Supreme Court discovered only two state court decisions even discussing the significance of pre-arrest, post-Miranda silence. See Petitioner's Appendix, at 24b-25b. The

petitioner has cited no other state or federal court which has considered this issue, nor is the respondent aware of any. This is not surprising given the fact that accused persons presumably are given Miranda warnings only after their arrest. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The basis for the petition is attenuated for a second reason. The "silence" upon which the petitioner claims the state impermissibly commented pertains to his failure to correct a false written statement accompanied by Miranda warnings. However, the same false statement had already been given to police by the petitioner orally, prior to his arrest and prior to any Miranda warnings. The petitioner's "silence" after this oral statement and

prior to his arrest was, therefore, open to comment by the state without any violation of the Due Process Clause. Jenkins v. Anderson, 447 U.S. 231 (1980). The fact that Miranda warnings were given in connection with the petitioner's subsequent written statement - even assuming arguendo that Doyle applies to pre-arrest, post-Miranda warnings silence - does not change the fact that such comment by the state on the oral statement was independently admissible. In this sense, the petition presents an issue which is not only unusual and isolated; it is academic.

II. The Decision Of The Connecticut Supreme Court Presents No Conflict Of Authority

As another basis for his petition, the petitioner asserts that the decision below demonstrates a significant

conflict of authority as to the application of harmless error law to alleged Doyle violations. See Petition, at 20. Specifically, he claims that while federal courts of appeal have uniformly applied harmless error analysis to Doyle claims, they "have not standardized the measure of harmfulness in relation to Doyle violations." Petition, at 22. This claim provides no basis for the petition.

First, the petitioner assumes that comment on a defendant's pre-arrest, post-Miranda warnings silence constitutes a Doyle violation. Only one appellate court has squarely reached this conclusion. State v. Fencl, 109 Wis.2d 224, 234, 325 N.W.2d 703 (1982). See State v. Robinson, 496 A.2d 1067, 1072 (Me. 1985) (finding harmless error

on similar facts). Thus, the premise of the petitioner's harmless error argument, and therefore his assertion of a conflict of authority, is fragile indeed. None of the federal decisions upon which the petitioner relies even discusses the constitutional significance of a comment on pre-arrest, post-Miranda warnings silence. See Petition, at 20-25.

Second, the petitioner's claim that courts have not "standardized the measure of harmfulness" of Doyle violations is not premised upon the applicability of harmless error analysis, but rather upon a comparison of the "harm" perceived in each case and the "value" assigned to the error by each court. Any such comparison of decisions necessarily requires a subjective

judgment by this Court as to each case; what may be harmless error in one case might require reversal in the next. Certiorari should not be predicated upon such exquisitely fact-laden questions.

Finally, it is important to note that a pillar of the petitioner's advocacy for a "strict" harmless error test for Doyle violations has already collapsed. In support of his claim for a standard requiring overwhelming evidence of guilt in order to overcome a Doyle error, the petitioner relies on United States ex rel. Miller v. Greer, 789 F.2d 438 (7th Cir. 1986). Petition, at 23. Yet, he has failed to acknowledge that the case was reversed by this Court on June 26, 1987 upon a finding that no Doyle violation had occurred, let alone a harmless one.

Greer v. Miller, ___U.S.___, 107 S.Ct. 3102, reh'g. den., ___ U.S. ___, 108 S.Ct. 30 (1987).

III. The Petitioner's Claim Is Insubstantial On Its Merits

The petitioner would have this Court greatly expand the confines of Doyle violations to include comments on silence after the mere utterance of Miranda warnings by a police officer, even in non-custodial circumstances. Yet, he has done so upon a record which demonstrates, even under harmless error analysis, that reversal of his convictions is unwarranted.

The petitioner's assumption that the state's comment on his pre-arrest, post-Miranda warnings silence was violative of Doyle misses the point of Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 639 (1986), in which this

Court reaffirmed the significance of arrest to the constitutional underpinnings of Doyle: "The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." (Emphasis added.) Thus, the petitioner has failed to establish that the unusual circumstances of this case even implicate the due process protections of Doyle. Cf. South Dakota v. Neville, 459 U.S. 553 (1983) (defendant's silence after statutorily prescribed warnings lacked the constitutional significance of silence following Miranda warnings).

Moreover, assuming arguendo the applicability of harmless error analysis

to this case, the record fully supports the conclusion that reversal of the petitioner's convictions is unwarranted. As the Connecticut Supreme Court held:

> The credibility of [the petitioner's] alibi defense advanced at trial already had been 'substantially damaged,'. . . by the testimony of his first alibi contained in his statement to the police, that he had been in the company of those witnesses at the time the crime occurred. Coupled with the devastating effect of the [petitioner's] prior admittedly contrived alibi upon the credibility of his testimony at trial, the evidence of the crime by the state must fairly be characterized as overwhelming.

Petitioner's Appendix, at 28b-29b. The Connecticut Supreme Court's harmless error analysis thus establishes that there exists no sound basis for reversal of the petitioner's convictions even under the "strict" harmless error test he urges this Court to adopt. Petition,

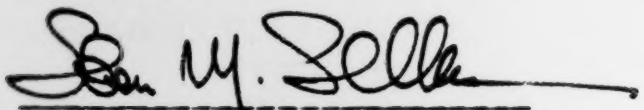
at 25. The judgment of the Connecticut Supreme Court is correct and there is, therefore, no reason for this Court to exercise its certiorari jurisdiction.

CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari.

Respectfully submitted.

STATE OF CONNECTICUT,
RESPONDENT

By: 

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APPENDIX

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Excerpt From Respondent's Brief
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EXCERPT FROM RESPONDENT'S BRIEF IN THE CONNECTICUT SUPREME COURT

I. THE ADMISSION OF EVIDENCE OF THE DEFENDANT'S FAILURE TO INFORM POLICE OF THE ALIBI HE ASSERTED AT TRIAL, WHICH THE APPELLATE COURT HELD TO BE HARMLESS ERROR UNDER STATE V. APOSTLE, 8 CONN. APP. 216, 512 A.2d 947 (1986), WAS NOT ERROR UNDER DOYLE V. OHIO, 426 U.S. 610 (1976) AND ITS PROGENY

* * *

B. Facts Relating to the Defendant's Claim

Milford police officers first contacted the defendant regarding the victim's sexual assault complaint on March 10, 1983, four days after the crime. T. at 104. Officers Graham and Talnose, after attempts to contact the defendant by telephone proved unsuccessful, drove to the defendant's Milford home and arrived at about 10:45 a.m. T. at 65, 69, 104-05. Greeted by the defendant at the front door, Officer

Graham told the defendant that his name "had come up in an investigation" and asked him to stop by the police station later in the day to discuss the matter. T. at 73, 104. In response to the defendant's query as to "what it was all about," Graham told the defendant that he would rather discuss the matter at the police station. T. at 73-74. The defendant agreed to meet the officers at the Milford police station at 1:00 p.m. that day and the officers left. T. at 74-104. No Miranda warnings were given to the defendant by the officers at the defendant's home. T. at 74.

The defendant arrived at the police station as agreed and was escorted by Officer Graham to a conference room. T. at 105-106. The room was "fairly large," and contained a table, several

chairs and a bulletin board. T. at 106. One wall of the room was predominantly "one-way" glass, which permitted observation of the room from the outside. Id. Officers Graham and Talnose informed the defendant, prior to the interview, that he was not under arrest and was free to leave, and then told him of the sexual assault complaint lodged by the victim. T. at 106-107. The defendant was then asked to account for his time on the night of the assault, which he did in some detail. T. at 107. The defendant's oral statement, in which he denied the accusation; t. at 107; was then reduced to a written statement which the defendant signed.12 See State's Exhibit

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12 Four people were present when the defendant executed the written statement: Officers Graham and Talnose,

H. Once the statement was completed, the defendant left the police station, no more than ninety minutes after he arrived. T. at 787-78.

After his oral statement, but prior to executing the written statement, the defendant was advised of his Miranda rights,13 read a "rights waiver" form, initialed each right on the document and then signed it. T. at 68-78, 107-108. In addition, his written statement included the following recitation:

> I, Timothy C. Shashaty (6-6-62), age 20, of 345 Pond Point Avenue, City of Milford, State of Connecticut, make the following statement without

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a stenographer, and a person identified in the record only as "Mrs. Banks". T. at 77.

13 The defendant conceded in the Appellate Court that he was not under arrest at the time of his questioning. Defendant's Appellate Court Brief, at 13, See T. at 68, 78, 107-108.

> promise, knowing it may be used in court. I have been advised that I have a right to consult with a lawyer, to stand mute, and to sign nothing. These Rights I hereby wave. I make this statement to Sergeant W. Graham, whom I know to be a member of the Milford Police Department.

See State's Exhibit H; T. at 110.

The text of the written statement, in pertinent part, recited that the defendant had left the Lewis house at 1:00 a.m. with his girlfriend Melissa Junget, and two other friends, William McClafferty and Maryann Kopec in Kopec's car and was driven directly to his home, where he immediately went to bed. See State's Exhibit H; T. at 110-112. At trial, the defendant admitted that he had lied in the written statement as to his whereabouts; T. at 288; but asserted the alibi defense that he had been

picked up by "Mark" after the Lewis party and had been driven directly to his home. T. at 248, 271, 273, 286.

In the absence of the jury, the state sought to introduce rebuttal evidence that the defendant had not, after the written statement of March 10, 1983 but before his formal arrest on March 23, 1983, informed police that he had lied in his written statement or advised them of the alibi he asserted at trial. T. at 341-342. In addition, the state sought to adduce evidence of the defendant's silence in transit to the police station, after his formal arrest but before the advisement of Miranda rights at the police station. T. at 342. The trial court, after hearing the arguments of counsel, overruled the defendant's objection to the proffered

evidence and noted the defendant's exception. T. at 342.14 Officer Graham then testified, in relevant part, as follows:

> [Mr. Kelly:] And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?
>
> A. No.
>
> [Mr. Kelly:] At any time during that period or [sic] time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from Emily Lewis's party on March 6?
>
> A. No.

T. at 344.

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14 The transcript of trial proceedings does not disclose the basis for the defendant's objection and exception. T. at 342.